UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 10-32(2) (JNE/SER)

UNITED STATES OF AMERICA, Plaintiff, v. STEVEN JOSEPH LEACH, Defendant.	)	MOTION FOR PRELIMINARY ORDER OF FORFEITURE

The United States of America, by and through B. Todd Jones, United States Attorney for the District of Minnesota, and James S. Alexander, Assistant United States Attorney, respectfully moves this Court, pursuant to 18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461(c), and Fed. R. Crim. P. 32.2, for a Preliminary Order of Forfeiture in the above-captioned case and in support thereof represents to the Court the following:

1. On February 10, 2010, a federal grand jury sitting in the District of Minnesota returned an Indictment against defendants Dennis Earl Hecker and Steven Joseph Leach. A Superseding Indictment was returned on March 9, 2010.

2. On September 30, 2010, a criminal Information was filed against Defendant Steven Joseph Leach. Defendant Leach was charged with conspiracy to commit wire fraud in violation of 18 U.S.C. § 371.

3. On October 1, 2010, the United States and the defendant entered into a Plea Agreement, whereby the defendant agreed to plead guilty to Count 1 of the Information.

4. In paragraph 9 of the Plea Agreement, the United States expressly reserved its right to seek the forfeiture of any of the defendant's real or personal property in criminal, civil, or administrative proceedings as provided by law, including such property that is traceable to, derived from, or constitutes proceeds of his offense, as well as such property which constitutes forfeitable substitute assets.

5. Rule 32.2(b) of the Federal Rules of Criminal Procedure provides that:

> (b) Entering a Preliminary Order of Forfeiture.
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> (1) Forfeiture Phase of the Trial.
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> (A) Forfeiture Determinations. As soon as practical . . . after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense.
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> . . .
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> (B) Evidence and Hearing. The court's determination may be based on evidence already in the record, including any written plea agreement, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If the forfeiture is contested, on either party's request the court must conduct a hearing after the verdict or finding of guilty.

> (2) Preliminary Order.
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> (A) Contents of a Specific Order. If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture . . . directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria. The court must enter the order without regard to any third party's interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

6. Based upon the Defendant's Plea Agreement, the United States requests the entry of a preliminary order of forfeiture entering a personal money judgment forfeiture against the Defendant in the amount of $14,195,949.

ARGUMENT

I. A Personal Money Judgment Forfeiture Should Be Entered As To Defendant Steven Joseph Leach.

Federal law authorizes the forfeiture of "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to . . . any offense constituting 'specified unlawful activity' (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense." 18 U.S.C. § 981(a)(1)(C). Wire fraud, in turn, is included within the definition of "specified unlawful activity." *See* 18 U.S.C. § 1956(c)(7)(A) (incorporating the offenses listed in section 1961(1)).[1]

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[1]Section 981(a)(1)(C) is a civil forfeiture provision. However, under 28 U.S.C. § 2461(c), the government may seek the

Criminal forfeiture is a part of sentencing, it is not a substantive element of the offense. *Libretti v. United States*, 516 U.S. 29, 38-39 (1995). Since criminal forfeiture is an aspect of sentencing, the preponderance of the evidence standard of proof applies. *United States v. Phie Van Nguyen*, 602 F.3d 886, 903 (8th Cir. 2010); *United States v. Huber*, 462 F.3d 945, 949 (8th Cir. 2006) (rejecting argument that defendant was entitled to have the jury decide forfeiture beyond a reasonable doubt); *United States v. Bieri*, 21 F.3d 819, 822 (8th Cir. 1994) (preponderance of the evidence standard applies to criminal forfeiture).

Third party claims to property, if any, are addressed in an ancillary proceeding, and are not at issue at this stage of the proceeding. *See* 21 U.S.C. § 853(n), incorporated by 28 U.S.C. § 2461(c); Fed. R. Crim. P. 32.2(c). The preliminary order of forfeiture is entered "without regard to any third party's interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c)." Fed. R. Crim. P. 32.2(b)(2)(A).

Criminal forfeiture may involve the forfeiture of specific property, and may also include a money judgment. *See e.g. United States v. Huber*, 404 F.3d 1047, 1056 (8th Cir. 2005) ("Forfeiture

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criminal forfeiture of property in any instance where civil forfeiture is authorized. *United States v. Loren Jennings*, 487 F.3d 564, 585 (8th Cir. 2007).

under section 982(a)(1) in a money-laundering case allows the government to obtain a money judgment representing the value of all property 'involved in' the offense, including 'the money or other property being laundered.'"); *United States v. Loren Jennings*, 487 F.3d 564, 586 (8th Cir. 2007) (affirming money judgment for amount of proceeds defendant derived from "honest services" mail fraud scheme); *United States v. Moyer*, 313 F.3d 1082, 1083 (8th Cir. 2002) (upholding money laundering forfeiture of amount equal to the amount defendant embezzled from pension plan and then used to pay personal creditors in violation of section 1957); *United States v. Vampire Nation*, 451 F.3d 189, 202 (3d Cir. 2006) (as an *in personam* order, a forfeiture order may take the form of a judgment for a sum of money equal to the proceeds the defendant obtained from the offense, even if he no longer has those proceeds, or any other assets, at the time he is sentenced).

The United States recognizes that Defendant Leach did not personally receive the proceeds of the wire fraud conspiracy. However, all coconspirators are jointly and severally liable for the amount of the forfeiture, regardless of the personal benefit that they received. *United States v. Hively*, 437 F.3d 752, 763 (8th Cir. 2006) (RICO defendant is liable for the proceeds of the entire scheme, not just the proceeds of the two predicate acts on which he was convicted); *United States v. Simmons*, 154 F.3d 765, 769-70 (8th Cir. 1998) (each defendant is jointly and severally liable for all foreseeable proceeds of the scheme; the Government is not required to prove the specific portion of proceeds for which each defendant is responsible; RICO defendant cannot limit his liability to proceeds of the racketeering acts he was charged with committing personally); *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005) (all coconspirators are jointly and severally liable for the amount of the forfeiture regardless of how much or how little they benefitted from the conspiracy).

A money judgment forfeiture should be entered against Defendant Leach in the amount of $14,195,949. This amount represents the amount of the loss that was foreseeable to Defendant Leach with respect to the Hyundai and Suzuki fraud schemes. The Hyundai and Suzuki fraud schemes are summarized in paragraph 2 of the Plea Agreement And Sentencing Stipulations (Factual Basis). The Hyundai fraud related to Chrysler Financial's financing of approximately 5,000 "risk" vehicles believing that they were "repurchase" vehicles. Risk vehicles posed a greater risk to Chrysler Financial, because there was no guarantee that Hyundai Motor America would in effect buy back the vehicles for a set price after a certain period of time and subject to certain conditions. Defendant Leach agreed that, with respect to the "Hyundai" fraud scheme, the loss amount that was reasonably foreseeable to Defendant Leach was approximately $13 million. Plea Agreement ¶2 (page 4). The Presentence Investigation Report has determined that the loss that was reasonably foreseeable to Defendant Leach in connection with the Hyundai fraud scheme was in the amount of $13,326,949.

The "Suzuki" fraud scheme related to Chrysler Financial's financing of certain Suzuki vehicles without knowing that Rosedale/Walden had received significant incentives from American Suzuki Motor Corporation. Plea Agreement ¶2 (pages 5-6). The incentives reduced the amount of money that the vehicles actually cost Rosedale/Walden, and also reduced the ultimate "repurchase" payments Rosedale/Walden would receive after the vehicle was taken out of rental service and sold at auction. As such, the collateral for the lenders who financed the Suzuki vehicles was substantially less than what Defendant Leach and his co-conspirators represented it to be, and the lenders were at a significant financial risk that the vehicle sale proceeds, including the repurchase payments, would be insufficient to pay off the Suzuki vehicle financing. Defendant Leach agreed that, with respect to the "Suzuki" fraud scheme, the loss amount that was reasonably foreseeable to Defendant Leach was approximately $800,000. Plea Agreement ¶2 (page 6). The Presentence Investigation Report has determined that the loss that was reasonably foreseeable to Defendant Leach in connection with the Suzuki fraud scheme was in the amount of $869,000.

The government therefore requests that this Court order Defendant Leach to pay a personal money judgment forfeiture in the amount of $14,195,949. This amount is the total of the loss that was reasonably foreseeable to Defendant Leach in connection with the Hyundai fraud scheme ($13,326,949) plus the loss that was reasonably foreseeable to Defendant Leach in connection with the Suzuki fraud scheme ($869,000).

The amount of the money judgment forfeiture being requested is less than the government could seek under the law. Restitution and forfeiture are separate and independent aspects of criminal sentencing which have different measures.

> Forfeiture and restitution are distinct remedies. Restitution is remedial in nature, and its goal is to restore the victim's loss. Forfeiture, in contrast, is punitive; it seeks to disgorge any profits that the offender realized from his illegal activity. Given their distinct nature and goals, restitution is calculated based on the victim's loss, while forfeiture is based on the offender's gain.

United States v. Weber, 536 F.3d 584, 602-03 (7th Cir. 2008) (citations omitted); *United States v. Plaskett*, 355 Fed.Appx. 639, 644 (3rd Cir. 2009); *United States v. Boring*, 557 F.3d 707, 714 (6th Cir. 2009). Because they serve different goals, restitution and forfeiture are calculated differently.

> The 'forfeiture and loss calculation[s] are distinct.' Forfeiture is a means of forcing a criminal defendant to disgorge ill-gotten profits. The theoretical limit of forfeiture is the value of the proceeds the defendant possesses from the illegal activity. Loss regards the 'reasonably foreseeable pecuniary harm that result[s] from the offense.' Loss focuses on the harm the victim suffered, independent of what the defendant gained. Though the two calculations may at times yield the same outcome, they are not identical.

United States v. Celicia Hoover-Hankerson, 511 F.3d 164, 171 (D.C. Cir. 2007) (citations omitted); *United States v. Hamaker*, 455 F.3d 1316, 1337 (11th Cir. 2006) ("Because '[f]orfeiture is a penalty imposed on a criminal independent of any loss to the crime victim,' the amount of the jury's forfeiture verdict is not necessarily the correct measure of loss for sentencing purposes, and the procedures for arriving at a forfeiture amount and calculating loss are distinct.") (citations omitted).

Thus, in seeking a money judgment forfeiture in the amount of $14,195,949, the government is limiting the amount of the money judgment to the amount of the loss that was reasonably foreseeable to Defendant Leach in connection with the Hyundai and Suzuki fraud schemes, and is not requesting the gross proceeds of the fraud conspiracy. The United States is limiting the amount of the requested money judgment in recognition of the fact that a substantial restitution judgment will also be imposed on Defendant Leach at sentencing.

II. Forfeiture Of Property As Substitute Assets.

This motion does not seek the forfeiture of specific assets at this time. However, the government reserves its right to seek the forfeiture of substitute assets pursuant to 21 U.S.C. § 853(p), as incorporated by 28 U.S.C. § 2461(c), and Fed. R. Crim. P. 32.2(e).

Federal law authorizes the forfeiture of substitute assets in partial satisfaction of a money judgment forfeiture. The applicable statute in these proceedings, 21 U.S.C. § 853(p), provides as follows:

> (p) Forfeiture of substitute property
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> (1) In general.
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> Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant–
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> (A) cannot be located upon the exercise of due diligence;
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> (B) has been transferred or sold to, or deposited with, a third party;
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> (C) has been placed beyond the jurisdiction of the court;
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> (D) has been substantially diminished in value; or
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> (E) has been commingled with other property which cannot be divided without difficulty.
>
> (2) Substitute property
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> In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.[2]

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[2]21 U.S.C. § 853(n) is part of the drug forfeiture statute. However, the provisions of section 853, including the substitute property provision, is applicable here because it is incorporated by reference by 28 U.S.C. § 2461(c).

The forfeiture of substitute property is governed by Rule 32.2(e) of the Federal Rules of Criminal Procedure:

> (e) Subsequently Located Property; Substitute Property.
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> (1) In General. On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that:
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> > (A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or
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> > (B) is substitute property that qualifies for forfeiture under an applicable statute.

Rule 32.2(e)(1)(B) provides that the court may enter an order of forfeiture or amend an existing order forfeiture at any time to order the forfeiture of substitute assets. An order forfeiting substitute assets may be entered after a preliminary order of forfeiture is entered but before it is final as to the defendant; after the order is final as to the defendant and while it is on appeal; and after an appeal is final. *See United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed); *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996) (following *Hurley*; court may amend order of forfeiture at any time to include substitute assets). Pursuant to 21 U.S.C. § 853(p) and Fed. R. Crim. P. 32.2(e), the government is authorized to seek the forfeiture of substitute assets without regard to whether they are directly forfeitable because they were purchased with fraud proceeds. *United States v. Bryson*, 105 Fed. Appx. 470, 475 (4th Cir. 2004) (defendant cannot object to the forfeiture of a substitute asset on the ground that it was not traceable to the offense); *United States v. Candelaria-Silva*, 166 F.3d 19, 42 (1st Cir. 1999) (that there is no nexus between the substitute asset and the offense is irrelevant; if there were a nexus, it would not be necessary to invoke the substitute assets theory); *United States v. Voigt*, 89 F.3d 1050, 1086 (3d Cir. 1996) ("the substitute asset provision comes into play only when forfeitable property cannot be identified as directly 'involved in' or 'traceable to' [the criminal offense].").

The government reserves its right to seek the forfeiture of substitute assets in this proceeding. Certain financial accounts are currently restrained pursuant to an order issued by this Court. *See* Amended Restraining Order (Docket No. 224). In addition, notices of lis pendens have been filed with respect to two separate parcels of real estate located in Burnsville, Minnesota, and Scottsdale, Arizona. As explained further below, the government's primary goal is to recover assets for criminal restitution. The government intends to seek the forfeiture of substitute assets as needed to maximize the funds that are available to pay restitution.

III. Forfeiture And Criminal Restitution.

To the extent that a subsequent motion is brought seeking the forfeiture of assets, the United States will request that the U.S. Department of Justice authorize the application of the forfeited assets to criminal restitution. The distribution of the proceeds of forfeited assets to crime victims is handled pursuant to the regulations contained at 28 C.F.R. Part 9. Pursuant to these regulations, the Department of Justice, Criminal Division, Asset Forfeiture and Money Laundering Section, has been delegated the authority to return the proceeds of forfeited assets to criminal victims. *See* 28 C.F.R. § 9.1(b)(2) ("Remission and mitigation functions in judicial cases are performed by the Criminal Division of the Department of Justice. Within the Criminal Division, authority to grant remission and mitigation is delegated to the Chief, Asset Forfeiture and Money Laundering Section, Criminal Division."). Provisions applicable to crime victims are contained, in particular, at 28 C.F.R. § 9.8.

The U.S. Attorney's Office will be seeking the approval of the Department of Justice to distribute the proceeds of the forfeited assets to the victim of Defendant's offenses.

IV. Motion For An Order Allowing Discovery To Identify Additional Assets Subject To Forfeiture.

The United States also seeks the entry of an order pursuant to Rule 32.2(b)(3), Federal Rules of Criminal Procedure, authorizing the government to conduct discovery for the purpose of identifying and locating additional assets subject to forfeiture to the United States, property traceable to such assets, or assets of the defendant that may be substituted up to the value of the forfeited assets. Rule 32.2(b)(3), Federal Rules of Criminal Procedure, authorizes the Government, upon the entry of a preliminary order of forfeiture, to "conduct any discovery the court considers proper in identifying, locating, or disposing of the property" that has been forfeited to the United States. Such discovery may include the taking of depositions of witnesses. *See* 21 U.S.C. § 853(m); *United States v. Saccoccia*, 898 F. Supp. 53 (D.R.I. 1995) (Government can take depositions for the purpose of locating assets controlled by the defendant that are subject to forfeiture). In addition, the reference in Rule 32.2(b)(3) to "any discovery the court considers proper" necessarily permits the court to authorize discovery under the Federal Rules of Civil Procedure. Such discovery includes, but is not limited to, the authority to issue a request for documents to a party under Rule 34 and to a non-party under Rules 34(c) and 45.

The government seeks an order authorizing discovery to locate assets subject to forfeiture, or to obtain additional information concerning assets that the government is already aware. The court is also requested to retain jurisdiction over this action pursuant to Rule 32.2(e) to forfeit any subsequently discovered substitute property, and to dispose of any third-party claims to such assets.

WHEREFORE, the United States moves this Court for a Preliminary Order of Forfeiture, and requests that the forfeiture be included in Defendant Leach's criminal judgment as required by Fed. R. Crim. P. 32.2(b)(4)(A) and (B).

Respectfully submitted,

Dated: February 1, 2011

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